**PP**

**v.**

**MOHD IRWAN SULAIMAN**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL TRIAL NO: MT1-45-7-2003]
3 JULY 2008

***CRIMINAL PROCEDURE:*** *Dangerous Drugs - Trafficking in 456.8gm of cannabis - Elements - Whether proved - Whether elements of possession proven - Accused not having exclusive access to room where drugs were found - No evidence of direct trafficking - Statutory presumptions of trafficking under s. 37 Dangerous Drugs Act 1952 cannot be invoked - Dangerous Drugs Act 1952 s. 39B(1)(a)*

***CRIMINAL PROCEDURE:*** *Dangerous Drugs - Possession of 12.19gm of cannabis - Whether elements of possession proven - Prima facie case of actual possession proven - Dangerous Drugs Act 1952, s. 6*

***CRIMINAL PROCEDURE:*** *Charge - Framing or particulars of - Time of commission of offence wrongly stated in charge - Two separate charges against accused for two different offences alleged to have been committed at two different places - Identical time stated in both charges - No explanation proffered by prosecution - Doubt as to time of alleged commission of offence - Benefit of doubt to be given to accused*

***CRIMINAL PROCEDURE:*** *Sentence - Dangerous drugs - Possession of 12.19gm of cannabis - Five years' imprisonment from date of arrest*

A police party had stopped the accused who was riding a motorcycle. When the police identified themselves, the accused attempted to flee but was arrested. A pouch seized from the accused's waist contained 14 transparent plastic packets containing cannabis. The accused was then ushered into the police car and the accused showed the direction to the house where he was staying. On arrival there, the accused took a bunch of keys from his front trousers pocket and unlocked the front door. The accused then unlocked the door to the back room of the house by using the same bunch of keys. On entering the room, the accused used his right foot to show a brown box at the base of the rack in the room. The box contained one compressed substance wrapped in transparent plastic and silver paper and 20 transparent plastic packets containing cannabis. A shirt and trousers found in the said room were found to fit the accused. The accused was charged with (i) trafficking in 456.8gm of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952

(DDA52) and punishable under s. 39B(2) DDA52 ("the first charge"); and (ii) possession of 12.19gm of cannabis punishable under s. 6 DDA52 ("the second charge"). The back room was also occupied by one Nor Asykin (SP9). There were also other occupants in the house eg, the tenant (SP8); and SP8's wife (SP11). Learned counsel for the accused submitted that: (i) the drug was recovered from the room which was also occupied by SP9, and so the accused cannot be said to be in exclusive possession of the exhibits; and (ii) there was no evidence that the accused had exclusive use of the back room, where the exhibits were recovered. The accused pleaded guilty to the second charge.

**Held (acquitting and discharging the accused of the first charge):**

**(1)** In order to establish a *prima facie* case for the first charge, it was incumbent upon the prosecution to prove that: (1) the substance in question was cannabis; (2) the weight was 456.8gm; and (3) the accused was in possession of and trafficking in cannabis, either by way of direct evidence or invoking the relevant statutory presumption. For the second charge, the prosecution had to establish that the accused was in possession of 12.19gm of cannabis. (paras 3 & 4)

**(2)** In so far as the first charge was concerned, the evidence clearly demonstrated that the accused was not the only person having exclusive access to the house or the back room where the exhibits were recovered. As the back room was undoubtedly accessible to other people besides the accused, the prosecution had not succeeded in proving a *prima facie* case of possession against the accused. There was also no evidence of direct trafficking. The prosecution's failure to prove the accused's possession of the exhibits meant that none of the statutory presumptions of trafficking under s. 37 could be invoked against the accused. (paras 23 & 29)

**(3)** In both the charges, the time stated therein, *ie*, "at about 12.15pm", was identical. It was humanly impossible for the accused to be in two different places at the same time *ie*, "at about 12.15pm". The offence contained in the first charge was alleged to have been committed by the accused at the back room of the house and that was second in time. The second charge was indeed first in time. The prosecution proffered no explanation in this regard. This bizarre feature left a lingering doubt in relation to the time of the alleged commission of the offence contained in the first charge. It is trite law that the benefit of this doubt should be given to the accused, in so far as the first charge is concerned. (para 30)

**(4)** In relation to the case of possession under s. 6, there was a simple and straightforward *prima facie* case of actual possession. (para 35)

**(5)** Having regard to the mitigation plea, public interest, the quantity of cannabis, and the fact that the accused had been remanded from the date of arrest, the court imposed on him a sentence of five years' imprisonment with effect from the date of arrest. (para 38)

**Case(s) referred to:**
*Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC* ***(refd)***
*Chan Pean Leon v. PP [1956] 22 MLJ 237* ***(refd)***
*Leow Nghee Lim v. Reg [1955] 1 LNS 53 HC* ***(refd)***
*Saludin Surif v. PP [1997] 3 CLJ 529 CA* ***(refd)***

**Legislation referred to:**
Common Gaming Houses Ordinance 1953, s. 4(1)(c)
Dangerous Drugs Act 1952, ss. 6, 37, 39B(1)(a), (2)

**Other source(s) referred to:**
*Stephen's Digest*, 9th edn, p 304

*For the prosecution - Borhan Osman; DPP*
*For the accused - P Nair; M/s P Nair & Co*

*Reported by Amutha Suppayah*

## JUDGMENT

**Low Hop Bing J:**

### Charges

**[1]** The accused faces two charges *viz*:

(1) trafficking in 456.8gm of cannabis on 11 July 2003, at about 12.15pm in a house at No. 555-2, Batu 31/4, Jalan Bukit Godek, Kandang Melaka, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act ("the first charge"); and

(2) possession of 12.19gm of cannabis on 11 July 2003, at about 12.15pm at Batu 4, Jalan Kandang, Melaka, punishable under s. 6 of the same Act ("the second charge").

**[2]** For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated.

A **Ingredients**

**[3]** In order to establish a *prima facie* case for the first charge, it is incumbent upon the prosecution to prove that:

(1) The substance in question is cannabis;

B

(2) The weight is 456.8gm; and

(3) The accused was in possession of and trafficking in cannabis, either by way of direct evidence or invoking the relevant statutory presumption.

C

**[4]** For the second charge, the prosecution must establish that the accused was in possession of 12.19gm of cannabis.

**Substance And Weight Of Cannabis**

D **[5]** In relation to both the charges, the unchallenged evidence of the chemist confirmed that the substance analysed by him was cannabis as defined under s. 2. The defence does not challenge the respective weight of the cannabis in question. Hence, these ingredients are indeed non-issues.

E

**Possession And Trafficking**

**[6]** These ingredients require a more elaborate treatment and warrant a maximum evaluation of the evidence adduced for the prosecution. The narrative of my finding of facts will now follow.

F

**[7]** On 11 July 2003 at about 12 noon one chief inspector Mustafa Kamal (SP5) and his police party including D/Sgt Joha Md Noh (SP6) and D/Cpl Syed Idris Syed Bahri (SP7) kept watch on the main road leading to Batu 4, Kandang, Melaka to trace the rider of a motorcycle ("the motorcyclist") bearing registration No. JDH 8944 ("the motorcycle") which was proceeding from the main road to the kampong road there.

G

**[8]** Upon spotting the motorcyclist, SP5 shouted to that direction, saying that they were police. At that time, the motorcyclist, identified as the accused, alighted from his motorcycle and attempted to flee, but was arrested by SP6 some 20 meters away from the place where the accused alighted. The accused was handcuffed to the front. SP5 and one detective lance corporal then went towards SP6 and the accused.

H

I **[9]** SP6 seized a blue Bridgestone pouch from the accused's waist and handed it over to SP5 who unzipped it in the presence of the accused and SP6. SP5 found 14 transparent plastic packets tied together by rubber bands, containing dried leaves suspected to be cannabis.

**[10]** SP5 then requested the accused, to show the way to the house where the accused stayed. The accused, who was ushered to the police car, showed the direction to the house.

**[11]** On arrival there, the accused took a bunch of keys from his front trousers pocket by means of his hands which were handcuffed to the front.

**[12]** The accused then used the keys to unlock the front door, the iron grille and wooden door in front of the house which had two bedrooms *viz* a back room and a front room. There was also a lounge.

**[13]** The accused unlocked the door to the back room by using the same bunch of keys. On entering the room, the accused used his right foot to show a brown box at the base of the rack in the room.

**[14]** Together with SP7, SP5 seized the box and opened it in the accused's presence. SP5 found:

(1) one compressed substance wrapped in transparent plastic and silver paper sealed with cellotape which showed signs of having been cut; and

(2) 20 transparent plastic packets tied with rubber bands, containing dried leaves suspected to be cannabis.

(collectively, "the exhibits")

**[15]** SP5 then seized the exhibits, brought the accused to the narcotics department of the police contingent Melaka and lodged Kandang police reports 1436-1438/90 at 3.05pm on 11 July 2003. At 4pm, on the same day, SP5 handed the exhibits, the police reports and the accused to investigating officer (SP10) who kept the exhibits in his office steel cabinet.

**[16]** On 11 July 2003, at 5.30pm, SP10, SP5 and police photographer SP1 went to the house where SP10 used four keys to open the lock, grille, the front and back doors.

**[17]** From the back room of the house, SP10 recovered two M-size Esprit shirts, one white and one blue in colour, and also a pair of dark blue "GA Classic" size 29" jeans. SP10 directed SP1 to take photographs of the place where SP5 found the alleged drug. SP1 also took a photograph of the motorcycle. At 8.30pm, SP10 took out the exhibits and directed lance corporal Rashid to identify the fingerprint thereon but there was no trace of it. SP10 arranged the exhibits for the purpose of taking photographs.

**[18]** On 12 July 2003, at 8am, SP10 asked the accused to put on the shirt and the trousers which were found to fit the accused.

**[19]** The back room, where the exhibits were recovered, was also occupied by one Nor Asykin (SP9). There were also other occupants in the house eg, the tenant (SP8); and SP8's wife (SP11).

**[20]** By way of elaboration, the prosecution managed to establish that:

(1) the owner of the house (SP3) confirmed that on 30 June 2003, he rented the house to SP8, but the accused signed the tenancy agreement and collected the keys from SP3;

(2) SP8 and his wife SP11 occupied the front room, while SP9 lived in the back room;

(3) SP9 did not examine the shoe box found at the bottom of the rack in the back room;

(4) the accused stayed in the back room once in a while, by asking the keys from either SP8, SP9 or SP11, but the prosecution was unable to prove the date or dates on which the accused stayed there;

(5) from 7 July 2003 onwards, the accused lived in the lounge of the house but kept his clothes in the back room occupied by SP9; and

(6) SP11 confirmed that, on the day in question ie, 11 July 2003, SP8, SP9, SP11 and the accused had access to the house.

**First Charge**

**[21]** At the close of the prosecution's case, in relation to the first charge, learned counsel Mr. P Nair submitted for the accused that:

(1) the drug was recovered from the room which was also occupied by one Nor Asykin SP9, and so in law and in fact the accused cannot be said to be in exclusive possession of the exhibits; and

(2) there was no evidence that the accused had exclusive use of the back room, where the exhibits were recovered.

**[22]** Learned deputy public prosecutor Mr. Borhan bin Osman argued that the prosecution had proved that the accused was in "actual possession" of cannabis in that he had control and knowledge.

**[23]** In my judgment, in so far as the first charge is concerned, the evidence clearly demonstrates that the accused was not the only person having exclusive access to the house or the back room where the

exhibits were recovered. Given the factual matrix unfolded above, the question for determination is whether the accused can be said to be in possession of the exhibits. A

**[24]** The importance of the word "possession" in relation to either drug-related offences created under the Dangerous Drugs Act 1952, or other statutory offences, makes it necessary for me to embark upon a relatively detailed discussion. B

**[25]** In *Leow Nghee Lim v. Reg* [1955] 1 LNS 53, the facts revealed that the police raided a coffee shop and, in the drawer of the counter, found a cigarette tin containing nine small packets of prepared opium. They arrested the shopkeeper, the appellant. The drawer was not locked; it contained about 15 small books, in which sales to credit customers were entered and other articles indicating that the appellant and his assistants had access to the drawer. The magistrate convicted the appellant on a charge of possession of chandu. On appeal, the conviction was set aside, essentially on the ground that the circumstances of the case are equally consistent with the possession being that of one of the assistants. At pp. 30 and 31, Taylor J expounded as follows: C D

(1) The word "possession" is one of the most difficult of English words. It is derived from posse (to be able) and *sedere* (to sit or occupy). The fundamental concept is power of occupation, primarily referred to land, and later extended to the power of the user of a chattel; E

(2) The primary lay meaning of "possess" is to hold as property, to own. However, the primary legal meaning of "possess" is to have possession, as distinct from ownership. Hence, a "man in possession" is one who really has only custody; F

(3) "Possession" means possession irrespective of whether the possessor is the beneficial owner; G

(4) Probably, the most helpful definition of "possession" is "the relation of a person to a thing over which he may at his pleasure exercise such control as to the character of the thing admits, to the exclusion of other persons". Although this definition does not express, it does imply that possession includes some element of knowledge, not necessarily full or exact knowledge, but knowledge of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it; H

(5) How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances; I

(6) Without knowledge, there can be no possession, thereby importing *mens rea* as an essential element; and

(7) Possession may be joint but must be exclusive in the sense that the possessor or possessors must have the power to exclude other persons from enjoyment of the property.

**[26]** The ingredient of "possession" in the context of assisting in the carrying on of a public lottery in contravention of s. 4(1)(c) of the Common Gaming Houses Ordinance (now Act) 1953, was analysed in *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237. The relevant facts were that the police raided a shop which belonged to a partnership of which the appellant was a member-cum-cashier. He was sitting at a small counter at the back of the shop. In front of him was a small note-book containing 50 sheets of smooth paper and 50 sheets of rough paper bound alternately, the sheets of smooth paper being perforated near the binding so as to permit easy removal. Nothing was written on any of these sheets. In a waste-paper basket beside the appellant was found a day book filled with entries relating to trade transactions which had been transferred to other books of account and inside this was found a booklet similar to the one lying in front of the appellant. From this booklet, 17 of the smooth sheets were missing and the rough sheets corresponding to these missing sheets were inscribed with certain characters relating to characters lottery. There was evidence that a number of people besides the appellant had access to the waste-paper basket and that the table in front of him was used by other people. The learned magistrate convicted the appellant. On appeal, Thomson J. (later LP) set aside the conviction on the ground, *inter alia*, that on the facts, the magistrate could not have come to the conclusion that possession had been made out against the appellant. At pp. 238 to 240, his Lordship enunciated the following principles:

(1) There can be no possession without knowledge and there can be no possession without some power of disposal but an essential ingredient of all possession is that there must be an intention as owner in case of need to exercise that power to the exclusion of other persons;

(2) The question of what amounts to "possession" for the purposes of criminal law in reality involves two separate questions *viz*:

(a) whether the accused was in possession of the article in question; and

(b) by reason of the application of the maxim *"actus non facit reum nisi mens sit rea"* (the act and the mind must concur to constitute the crime), whether he had knowledge of the nature of the thing possessed;

(3) "A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to intend to do so in case of need". *Stephen's Digest* (9th Edn) p 304; and

(4) A physical element and a mental element or *animus possidendi* must be present before possession is made out. While the physical element may be proved by direct evidence, the mental element ie, intention is a matter of fact which in the nature of things cannot be proved by direct evidence, but by inference from the surrounding circumstances, and it is impossible to lay down any general rule.

**[27]** It is to be noted that in relation to the ingredient of possession in the aforesaid two authorities, several common denominators were indicated; the most significant one being exclusiveness or exclusivity in the sense that the possession in question must be to the exclusion of all other people. Hence, in relation to a drawer, the possessor or possessors must be proved that his or their access thereto is exclusive; so also, in the case of a rack, table, room, house or the like. In the absence of an exclusive access hereto, the ingredient of possession cannot be said to have been proved. There is no scarcity of weighty authorities which are supportive of this proposition. By way of illustration, I shall refer to two of them *viz*:

(1) *Abdullah Zawawi Yusoff v. Public Prosecutor* [1993] 4 CLJ 1 where the appellant and his wife were jointly charged with the offence of trafficking in cannabis found in a wooden box in an uncompleted house which at that time was occupied by the appellant, his wife, their children and another man. The house belonged to the appellant who was a carpenter by occupation and the carpenter's tools found in the box were his personal property. At the conclusion of the trial, the appellant's wife was acquitted and discharged but the appellant was convicted and sentenced to death. On appeal, the Supreme Court set aside the conviction and sentence, on the grounds, *inter alia*, that there was possible access to the uncompleted house by others, including eg, the accused's wife or the other man in the house.

(2) *Saludin bin Surif v. Public Prosecutor* [1997] 3 CLJ 529 CA, a police party led by an inspector searched certain premises and found two plastic bags containing cannabis. The appellant there and his girlfriend occupied one room while the drugs were found in another room which was not occupied by anyone in particular, but was used as a store and was never locked. She used that room to iron

clothes. There were five people in the premises. The appellant had smoked cannabis in the premises and had provided his girlfriend with cannabis before. The High Court convicted the appellant under s. 39B(1)(a). His appeal was allowed by the Court of Appeal as the room from which the cannabis was recovered was not only accessible to the residents of the premises but also to others who came to the premises.

**[28]** The facts in the above two authorities are far more serious than those in the instant case in the sense that the evidence there implicated the respective accused more vehemently but had fallen short of the crucial element of exclusiveness or exclusivity which was clearly fatal to the prosecution's effort in attempting to prove the ingredient of possession.

**[29]** In the instant case, as the back room was undoubtedly accessible to other people besides the accused, I am unable to come to a finding that the prosecution has succeeded in proving a *prima facie* case of possession against the accused. There is also no evidence of direct trafficking. The prosecution's failure to prove the accused's possession of the exhibits means that none of the statutory presumptions of trafficking under s. 37 can be invoked against the accused.

**[30]** Another bizarre feature in the prosecution's case is that in both the first and second charges, the time stated therein, ie, "at about 12.15pm", is identical. It is humanly impossible for the accused to be in two different places at the same time ie, "at about 12.15pm". The offence contained in the first charge was alleged to have been committed by the accused at the back room of the house and that was second in time. The second charge was indeed first in time. It certainly took some time to effect the arrest of the accused, seize the pouch from his waist, identify the drug suspected to be cannabis and the other follow-up actions by the police party, before proceeding to the house in question in the police car. It is not unreasonable to infer that the time expended thereon would easily be one hour before the police could proceed with the accused to the house. It would also take some time to reach the house. The drafting of the two charges relating to the same time "at about 12.15pm" is certainly beyond one's power of reasonable comprehension. The prosecution proffered no explanation in this regard. At the close of the prosecution's case, this bizarre feature leaves a lingering doubt in relation to the time of the alleged commission of the offence contained in the first charge. Surely, it is trite law that the benefit of this doubt should be given to the accused, in so far as the first charge is concerned.

**[31]** In the circumstances, in relation to the first charge under s. 39B(1)(a), I acquit and discharge the accused of trafficking without calling for his defence.

**Second Charge**

**[32]** It was argued for the accused that the prosecution has also failed to establish a *prima facie* case of possession under s. 6.

**[33]** The prosecution contended that defence should be called to answer the second charge.

**[34]** In this regard, a revisit to the relevant evidence is necessary.

**[35]** SP5 testified that the accused was riding on the motorcycle when SP5 and his police party stopped the accused at Batu 4, Kandang Melaka. Although the accused attempted to flee, he was arrested by SP5 and from the pouch attached to the accused's waist, SP5 found 14 plastic packets which were found to contain cannabis. This is a simple and straightforward *prima facie* case of actual possession and clearly satisfies the attributes of possession as alluded to above.

**[36]** In the circumstances, the defence is called to answer the second charge of possession under s. 6.

**[37]** Upon the three alternatives being explained to the accused, he pleaded guilty to the second charge. I then ascertained from him whether he understood the nature and consequences of his plea. He consulted his counsel and unhesitatingly gave his answer in the affirmative. I proceeded to explain to him the facts as alluded to above in my finding of facts, to which he admitted without any qualification or reservation. In the circumstances, I accepted his plea and recorded a conviction against him under s. 6.

**[38]** Section 6 provides for a maximum sentence of five years. Having regard to the mitigation plea, public interest, the quantity of cannabis, and the fact that he has been remanded from the date of arrest ie, 11 July 2003, I imposed on him a sentence of five years' imprisonment with effect from the date of arrest.